IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. [redacted]6

DANIEL J. SENTILLES,

Petitioner,

v.

INTER-CARIBBEAN SHIPPING CORPORATION,

Respondent.

PETITIONER'S REPLY BRIEF ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INTRODUCTION

Since the purpose of a reply brief is to do precisely what the adjective implies, the Petitioner will note herein those portions of the Respondent's brief that appear to require comment.

The following additional symbols will be used:

"P.B." for Petitioner's main brief

"R.B." for Respondent's brief

RESPONDENT'S STATEMENT OF THE CASE AND ARGUMENT

It is fundamental that the party who receives a favorable jury verdict and judgment in the trial court is entitled thereafter, on appeal, to the most favorable interpretation of facts that the jury could have drawn from the evidence adduced. It is therefore interesting to note that the Respondent does not, and can not, directly attack the Petitioner's statement of facts (P.B.4-6), but chooses instead to provide this Court with a new interpretation of the evidence, viewed in the light most favorable to the Respondent's case (R.B.2-4). We are therefore constrained, once more, to state the obvious: *The jury trial below resulted in a verdict for the Petitioner, not for the Respondent.* The Petitioner was, and is, therefore entitled to the statement of facts appearing in his main brief (pp. 4-6), which finds clear support in the evidence and is reaverred here by reference.

In its consideration of Dr. Jacobs' testimony the Respondent apparently chooses to ignore the doctor's statement that traumatic aggravation of tuberculosis is demonstrable anywhere from a few days up to three months after injury, *and that the Petitioner's case history was in conformity with that time pattern* (R.70-71; P.B.11). The Respondent also chooses to ignore Dr. Jacobs' testimony that the blow to the Petitioner's chest and his diabetes *both* contributed to activate or aggravate an existing, but dormant, tubercular state (R.79; P.B.11).

In its reference to Dr. London, who testified as an expert witness at the trial, the Respondent blandly places quotation marks around the word "expert" (R.B.4).

Whether or not the Respondent *now* considers Dr. London a qualified expert is of small significance here. The doctor's qualifications are extensive, and a matter of record (R.37-39). The Respondent did not object to the doctor's qualifications at the time of trial, and certainly cannot complain at this time, even by the chosen form of innuendo.

Counsel for the Petitioner agree that Dr. London testified that Petitioner's tubercular aggravation *could have been* caused by diabetes, malnutrition or trauma to the chest (R.B.4). However, the doctor further stated on three different occasions that the trauma was *probably* the responsible factor (R.42-43, 86-87, 88; PB.7-9). The Respondent's argument correctly insists that the Petitioner was required to adduce testimony relating to "probabilities" (R.B.6), but its statement of the case ignores the very testimony which meets that agreed standard of proof.

The Respondent quotes at some length from a portion of its cross-examination of Dr. London (R.B.4-6). In considering the quoted portions of the doctor's testimony, it is necessary to consider the contextual background which preceded the section supplied by the Respondent's brief. Dr. London, also on cross-examination, testified as follows:

(R. 83)

"Q. Now, we had the three factors there, malnutrition, infection and injury.

"A. Any loss of his natural resistance.

"Q. Either of those three could have done it?

"A. Yes.

"Q. And you have no way of knowing which of those three did it?

"A. I have no way of knowing *specifically.*" (Emphasis supplied)

(R. 86-87)

"Q. Doctor, as I understood your testimony here several minutes ago, you could not tell with any degree of reasonable medical probability whether this man's trouble was brought on acutely, as you say, by malnutrition, infection or trauma or blow. Isn't that still your testimony?

"A. Those were the various factors that could produce this type of condition.

"Q. I am asking you, isn't it your testimony that you cannot tell us which one of those was the cause with any reasonable probability, knowing the background that the man had?

"A. I believe I have already testified that I thought that the trauma to the chest was the precipitating factor."

It is clear, after reading all of Dr. London's testimony, that he was honest enough to consider the limitations and fallibility of informed medical opinion in tracing cause and effect. His resultant inability to determine, *with certainty*, which of three factors aggravated the Petitioner's condition certainly cannot be held to have destroyed his repeated assertions that Petitioner's fall was *probably* the responsible factor. The Petitioner was not required to adduce testimony which excluded every other *possible* factor. *Traveler's Insurance Co. v. McKain*, 5th Cir., 186 F.2d 273, 277.

Even assuming, *arguendo*, that there were conflicts in Dr. London's testimony, the jury was entitled to resolve those conflicts in the Petitioner's favor under the rule announced in *Liberty Mutual Insurance Co. v. Thompson*, 5th Cir., 171 F.2d 723, 726:

> "Moreover, it is the function of the jury, if it sees fit, to reconcile the testimony of any witness who has made inconsistent statements, or to believe only such parts of his evidence as it deems worthy of belief; and the jury is not required to reject the entire testimony of any witness merely because there are conflicts therein. . . .
>
> "Finally, the jury is the sole judge of the credibility of the witnesses and of the weight or value of their testimony. In actions at law in the federal courts, where the evidence is such that reasonable men may fairly differ . . . the right of trial by jury is preserved by the Seventh Amendment, 'and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law'. This means that an appellate federal court should not disturb the jury's finding of fact as to the accidental cause of appellee's disease if on the trial there was any substantial evidence to support it. This is so, even though the appellate judges may not believe the fact so found to be true, since an appellate court has no constitutional right to express an opinion as to the truth or falsity of such fact, the issue being entirely within the province of the jury."

The Respondent's brief does not comment upon point

=3 of the Petitioner's main brief (pp. 12-13), and the matter contained there is restated here by reference.

CONCLUSION

1) The Petitioner was not required to prove that his accident was the *only possible way* that his tuberculosis could have been aggravated.

2) The jury was entitled to believe Dr. London's testimony that the Petitioner's fall *probably* aggravated his tubercular condition, and thereupon return a verdict for the Petitioner.

3) The jury was entitled to believe Dr. Jacobs' testimony that the Petitioner's fall contributed to his advanced tubercular state, and thereupon return a verdict for the Petitioner.

4) The appellate court below usurped the jury's function when it reweighed the evidence and or the credibility of the witnesses.

5) The Petitioner's constitutional and statutory right to trial by jury was emasculated by the appellate court below.

6) The opinion and judgment of the Fifth Circuit Court of Appeals must be reversed.

Respectfully submitted,

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